



Having reviewed the entire evidentiary record filed herein, including the stipulations of the parties, the Appeals Board finds as follows:

FINDINGS OF FACT

Claimant began working for respondent in April 1990. On April 10, 1996, while attempting to lift a rotary table, claimant suddenly experienced a loss of all strength in his arms and dropped the table. Later that evening, he experienced pain in his arms, going up into his shoulders. Claimant first went to his family physician, Dr. Joe Stevens, who referred him for bilateral EMG studies. After the EMG results came back, claimant was referred to Dr. James L. Gluck, a board certified orthopedic surgeon in Wichita, Kansas.

Dr. Gluck examined claimant, diagnosing bilateral carpal tunnel syndrome and left ulnar nerve damage. He performed a left carpal tunnel release and anterior transposition of the left ulnar nerve on July 9, 1996. On September 10, 1996, he performed a right carpal tunnel release and right ulnar nerve decompression. He released claimant from his care on December 18, 1996, with a 7 percent impairment to the left upper extremity and a 5 percent impairment to the right upper extremity, which combined equates to a 7 percent whole body functional impairment. This was based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. Dr. Gluck acknowledged, if the AMA Guides, Third Edition (Revised), were used, the percentage of impairment would be identical.

Dr. Gluck placed restrictions on claimant, including no lifting greater than 35 to 40 pounds and restricted claimant from repetitive grasping, pushing and pulling, no more than three to four hours a day, and advised that claimant adjust any activities to his tolerance level for both strength and pain. Dr. Gluck was provided a job tasks list prepared by vocational rehabilitation expert Karen Crist Terrill which recorded claimant's 15-year work history prior to the injury, but Dr. Gluck refused to give any opinion as to whether claimant could or could not perform those tasks.

After being treated by Dr. Gluck, claimant continued having difficulties. He was referred to Dr. Lewonowski and underwent physical therapy. He was examined by Dr. Robert Eyster and ultimately was provided treatment by Dr. Paul Stein, who performed a discectomy with fusion at the C6-C7 cervical level. Dr. Stein treated claimant through May 14, 1997, at which time he was released to return to work. Claimant was examined on April 2, 1998, by Dr. Daniel Zimmerman in Westwood, Kansas, at the request of his attorney. Based upon the AMA Guides, Third Edition (Revised), Dr. Zimmerman found claimant to have a 43 percent permanent partial impairment to the body as a whole. He restricted claimant from lifting more than 20 pounds on an occasional basis, 10 pounds on a frequent basis, and advised he avoid hyperflexion and hyperextension of his cervicothoracic spine. He also advised claimant not hold his cervicothoracic spine in captive positions. Claimant was further advised to avoid frequent flexion, extension,

twisting, torquing and hammering activities with his upper extremities. He did believe claimant to be at maximum medical improvement at the time of his examination. Dr. Zimmerman was also provided a copy of the tasks list analysis prepared by Ms. Terrill. In reviewing the tasks provided in the list, Dr. Zimmerman felt claimant incapable of performing seventeen of the thirty-one tasks in the list, for a 55 percent loss of task performing ability.

Claimant was referred to Dr. John P. Estivo, an orthopedic surgeon, by respondent's attorney on November 12, 1998. Dr. Estivo assessed claimant a 35 percent whole body functional impairment pursuant to the AMA Guides, Fourth Edition. Dr. Estivo was also provided a copy of Ms. Terrill's job task list. In reviewing the job tasks, he found claimant to suffer a 16 percent loss of task performing abilities. He restricted claimant from lifting more than 35 pounds. He also advised against repetitive use of the upper extremities, indicating no more than 120 repetitions in a two-hour period per extremity.

Claimant was released with restrictions by Dr. Stein on May 14, 1997. Claimant made no attempts to obtain any type of employment until July 22, 1998, when, at the advice of his attorney, he began seeking employment opportunities. During the next three months, claimant made twenty-three different attempts to obtain employment. Of these contacts, claimant contacted in person only four companies, but did send resumes to nine companies, of which he followed up on two. As of the October 28, 1998, regular hearing, this was the full extent of claimant's job search.

Karen Crist Terrill prepared the job tasks list utilized by both Dr. Zimmerman and Dr. Estivo. In reviewing the restrictions of Dr. Gluck, Ms. Terrill found claimant to have a 12 percent loss of task performing abilities. In reviewing the restrictions of Dr. Zimmerman, Ms. Terrill found claimant to have suffered a 19 percent loss of task performing abilities. Respondent argues the opinions of Ms. Terrill should be considered in determining claimant's entitlement to a work disability under K.S.A. 1996 Supp. 44-510e.

#### CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, it is claimant's burden to establish his or her right to an award of compensation by proving the various conditions upon which the right depends by a preponderance of the credible evidence. See K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g).

It is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by medical evidence presented in the case and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

In considering the opinions of both Dr. Zimmerman and Dr. Estivo, the Appeals Board finds claimant has a 39 percent functional impairment to the body as a whole. The opinion of Dr. Gluck was not considered as he did not see claimant after the surgery to his cervical spine by Dr. Stein and did not consider the entirety of claimant's complaints.

K.S.A. 1996 Supp. 44-510e defines work disability as:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Respondent argues that the Board should consider the task loss analysis provided by Karen Crist Terrill when considering both Dr. Gluck's and Dr. Zimmerman's restrictions. K.S.A. 1996 Supp. 44-510e makes it clear that any task loss opinion is to be in the opinion of the physician. As such, the opinion of Ms. Terrill regarding claimant's task loss will not be considered for the purposes of this award.

Dr. Gluck, the treating physician and the one physician most likely to understand what, if any, limitations claimant may suffer from his upper extremity surgeries, refused to provide an opinion regarding claimant's task loss. Dr. Stein, who performed the surgery on claimant's neck, was not deposed in this matter and did not provide any opinion regarding what, if any, task loss claimant may have suffered from the injuries of April 10, 1996. The Board is, therefore, limited to considering the independent medical examinations of claimant's expert, Dr. Zimmerman, and respondent's expert, Dr. Estivo. Dr. Zimmerman found a 55 percent task loss when considering claimant's limitations and the task list prepared by Ms. Terrill. Dr. Estivo found a 16 percent task loss when considering the list prepared by Ms. Terrill. The Appeals Board finds no justification in placing greater weight on one expert over that of the other in this instance and finds claimant has suffered a 35.5 percent loss of task performing abilities.

The Appeals Board must next consider what, if any, wage loss claimant has suffered. K.S.A. 1996 Supp. 44-510e requires, once the task loss analysis has been completed, that the difference between the average weekly wage the worker was earning

at the time of the injury and the average weekly wage the worker is earning after the injury be averaged with the task loss percentage. In considering what, if any, wage loss claimant has suffered, the Appeals Board must also consider the policy set forth by the Kansas Court of Appeals in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). In Copeland, the Court of Appeals found that, if a claimant, post-injury, does not put forth a good faith effort to obtain employment, then the trier of facts is obligated to impute a wage based upon the evidence in the record as to claimant's wage earning ability. Here, claimant was released by Dr. Stein, his last treating physician, on May 14, 1997, after receiving over 70 weeks of temporary total disability compensation and undergoing several surgeries. Claimant, however, made no attempt to find a job until advised to do so by his attorney. That belated attempt did not begin until July 22, 1998.

The Appeals Board finds, based upon a review of the evidence, claimant failed to make a good faith effort to obtain employment until July 22, 1998, at which time he did begin contacting various companies. The Appeals Board will, therefore, impute a wage based upon the evidence in the record. In Ms. Terrill's report, she stated that claimant could earn \$6.50 per hour over a 40-hour week, totaling \$260 per week. When compared to claimant's average weekly wage of \$614.48, this computes to a loss of wages of 58 percent. The Appeals Board finds claimant has a 58 percent loss of wages and a 35.5 percent loss of task performing ability through July 21, 1998. When averaging the two, this equates to a 46.75 percent permanent partial general disability. As of July 22, 1998, the Appeals Board finds claimant began exhibiting a good faith effort to obtain employment. Claimant's loss of wages then becomes 100 percent. When compared to his 35.5 percent loss of task performing ability, this equates to a 67.75 percent permanent partial general disability.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated April 30, 1999, should be, and is hereby, modified, and an award is granted in favor of the claimant, Kenneth Hultman, and against the respondent, Professional Machine & Tool, Inc., and its insurance carrier, Continental Western Insurance Company, for an injury occurring on April 10, 1996, and based upon an average weekly wage of \$614.48.

Claimant is entitled to 70.14 weeks temporary total disability compensation at the rate of \$326 per week totaling \$22,866.53, followed thereafter by 48.86 weeks permanent partial disability compensation at the rate of \$326 per week totaling \$15,928.36 for a 46.75 percent permanent partial disability to the body as whole. As of July 22, 1998, claimant is entitled to a 67.75 percent permanent partial general disability. Thereafter,

claimant is entitled to 187.75 weeks permanent partial disability compensation at the rate of \$326 per week for a total award not to exceed \$100,000.

As of November 8, 1999, claimant is entitled to 70.14 weeks temporary total disability compensation at the rate of \$326 per week totaling \$22,866.53, followed thereafter by 48.86 weeks permanent partial disability compensation at the rate of \$326 per week totaling \$15,928.36, followed thereafter by 67.71 weeks permanent partial disability compensation at the rate of \$326 per week totaling \$22,073.46, for a total due and owing of \$60,868.35, which is ordered paid in one lump sum minus any amounts previously paid. Thereafter, the remaining balance of the \$100,000 shall be paid at the rate of \$326 per week until fully paid or until further order of the Director. The total award in this matter shall not exceed \$100,000 pursuant to K.S.A. 44-510f.

Claimant is further entitled to unauthorized medical payments up to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical benefits will be awarded upon proper application to and approval by the Director of Workers Compensation.

Claimant's attorney fee contract is approved insofar as it does not contravene the provisions of the appropriate version of K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Ireland Court Reporting	
Transcript of Regular Hearing	\$258.70
Deposition Services	
Deposition of Karen Crist Terrill	\$213.80
Gene Dolginoff Associates, Ltd.	
Deposition of Daniel Zimmerman, M.D.	\$563.25
Court Reporting Service	
Deposition of James L. Gluck, M.D.	\$ 97.35

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Randy S. Stalcup, Wichita, KS  
Jeffery R. Brewer, Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director